[J-89-2013] [MO: Saylor, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

EARL PATTON AND SHARON PATTON, H/W,	: No. 32 MAP 2013
Appellees	: Appeal from the order of the Superior Court at No. 85 EDA 2011 dated March 27, 2012, Reconsideration Denied May 31, 2012, affirming the judgment entered by
v.	: the Bucks County Court of Common Pleas, Civil Division, at No. 03-06581-2602 dated December 30, 2010.
WORTHINGTON ASSOCIATES, INC.,	: ARGUED: November 19, 2013
Appellant	

CONCURRING OPINION

MR. JUSTICE BAER **DECIDED: March 26, 2014**

Given the clear and unambiguous language of the relevant provisions of the Workers' Compensation Act (Act), as consistently interpreted by decades of precedent from this Court, I am constrained to join the Majority Opinion in full. As has been written several times over the past thirty-five years, however, the mandatory nature of workers' compensation has rendered the statutory employer doctrine obsolete.[1] Nevertheless, it

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[1] A lone, and extremely narrow exception to the statutory requirement that employers provide workers' compensation for their employees exists for employers that hold a religious objection to providing the benefits. 77 P.S. § 484. This provision permits applications to be filed with the Department of Labor and Industry for a waiver from workers' compensation coverage on the basis that the employer is

> a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any public or

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remains undisturbed within Pennsylvania's statutory scheme as an irrational relic of a bygone era. I respectfully urge our colleagues in the General Assembly to eliminate the doctrine, so that it no longer serves as blanket immunity for general contractors, thwarting a victim's right to recover from a tortfeasor, and an innocent subcontractor-employer's right to recoup workers' compensation payments through subrogation; while adversely impacting worker safety by eliminating the traditional consequences (money damages) when a general contractor's negligence harms a subcontractor's employee.

When the Workers' (then Workmen's) Compensation Act was first enacted by the General Assembly in 1915, employers were given the option to elect into the scheme of no fault limited liability contained within the Act, or to remain liable (with all available defenses) in common law for injuries sustained by their employees in the workplace. With that right of refusal came the statutory employer doctrine, which gave employees the ability to receive workers' compensation benefits from, in the most common scenarios, a general contractor when the injured worker's employer, the subcontractor, elected not to carry workers' compensation coverage. However, even general contractors could refuse to elect to provide coverage for a subcontractor's employees, so long as prominent notice was provided in the workplace, but, "[i]t soon became clear that only foolish contractors would reject the Act in this fashion, since acceptance of workers' compensation financial responsibility provided concomitant immunity to common law negligence claims, pursuant to Section 303 . . . ." Richard M. Jurewicz & Arthur L. Bugay, The Statutory Employer Defense in Pennsylvania Third Party Actions

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> private insurance which makes payments in the event of death, disability, old age or retirement or makes payments toward the cost of, or provides services for medical bills […].

Id. § 484(a).

(Plaintiff's Perspective), 69 Pa. B.A.Q. 29, 30 (Jan. 1998). Indeed, as early as 1929, this Court recognized that electing to carry workers' compensation coverage was the norm, because by disavowing the Act, contractors lost the immunity provisions that came with it. See Swartz v. Conradis, 148 A. 529, 530 (Pa. 1929).

In 1974, amendments to the Act removed the optional election element. The respective common law roles of the parties - injured employee versus negligent employer - were lost with the mandatory application of the Act. Yet, the statutory employer doctrine remained without any basis in policy or usefulness, continuing to harm employees of subcontractors by prohibiting them from suing a third party tortfeasor, and harming the subcontractors themselves by immunizing negligent general contractors from subrogation claims. As a former member of this Court cogently noted, "[i]n reality, application of [the 1974] amendments rarely, if ever, will result in the general contractor assuming responsibility for providing workers' compensation insurance because in the modern construction workplace, general contractors will rarely, if ever, award a contract absent the subcontractor showing proof of workers' compensation coverage." Fonner v. Shandon, 724 A.2d 903, 908 (Pa. 1997) (Nigro, J., dissenting). Indeed, since 1974, the only way the statutory employer doctrine will operate to guarantee a workers' compensation payment to an injured worker is if (1) the subcontractor violates the law (unlikely as noted by Justice Nigro); or (2) the religious exemption to the Act applies, as referenced supra note 1. See 77 P.S. § 484. Thus, the statutory employer doctrine serves one purpose: to provide immunity to a general contractor in tort, notwithstanding that it may have been a third party tortfeasor.[2]

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[2] Cf. 77 P.S. § 481(b), which provides:

> In the event injury or death to an employe is caused by a third party, then such employe, his legal representative, husband or wife, parents, dependents, next of kin, and

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For my part, I would advocate to the General Assembly that it revise the statutory employer doctrine to mirror that of our sister state, New Jersey. There, the doctrine only operates where a subcontractor has violated the mandatory provisions of the New Jersey Act and failed to obtain workers' compensation insurance. N.J. Stat. Ann. § 34:15-79(a). Under these circumstances, the general contractor steps into the shoes of the subcontractor, paying the subcontractor's employee's workers' compensation, and then receiving immunity from common law tort damages, while further having the ability to assert a right of subrogation against the noncompliant subcontractor. Id. Otherwise, "[w]here the subcontractor takes out compensation insurance . . . the general contractor is treated as a third party and is not granted immunity from a common law negligence suit by an employee of a subcontractor." Wilson v. Faull, 141 A.2d 768, 772 (N.J. 1958). Notably, the subcontractor is then likewise given a right of subrogation, should the general contractor be found negligent at common law. Id.; N.J. Stat. Ann. § 34:15-40.

Adopting such a paradigm would achieve several of the purposes found in the Pennsylvania Workers' Compensation Act. First, it maintains the primary purpose of the Act: the prompt payment of certain, statutorily defined benefits to an injured worker, regardless of fault. Second, it perpetuates the concomitant *quid pro quo* of immunity to

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> anyone otherwise entitled to receive damages by reason thereof, may bring their action at law against such third party, but the employer, his insurance carrier, their servants and agents, employes, representatives acting on their behalf or at their request shall not be liable to a third party for damages, contribution, or indemnity in any action at law, or otherwise, unless liability for such damages, contributions or indemnity shall be expressly provided for in a written contract entered into by the party alleged to be liable prior to the date of the occurrence which gave rise to the action.

the paying employer, whether a subcontractor or general contractor, that is equally important to the operation of the Act. Third, it preserves the Section 481(b) third party cause of action for injured employees in essentially all circumstances, without punishing the employee for what amounts to nothing more than happenstance if the negligent third party happens to be a general contractor. Cf. Frazier v. WCAB (Bayada Nurses, Inc.), 52 A.3d 241 (Pa. 2012) (noting the general availability of third party actions sounding in tort when an employee's work-related injury is caused by a negligent third party). In that same light, the subcontractor, more often than not, a small "mom and pop" business like Patton Construction, which did nothing wrong, would obtain a right of subrogation against the negligent general contractor, assigning blame where it belongs and reducing the small business's cost of workers' compensation insurance. Finally, it would help to ensure safety in the workplace, and hopefully lead to the prevention of tragic accidents due to someone's carelessness (as seen in the instant case), by incentivizing general contractors to adopt more rigorous safety regimes.